Appendix A

Opinion of the Court of Appeals

United States Court of Appeals
for the Ninth Circuit

Nos. 20,785 and 21,377

Western Pacific Railroad Company and The Southern Pacific Company, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

Howard K. Habermeyer, Thomas M. Healy and A. E. Lyon, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

[August 23, 1967]

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: POPE, HAMLEY and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Appellants are two of the railroads that are "employers" as defined in the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-367, as amended, particularly §351(a). They purport to sue, under Rule 23(a), F.R.Civ.P., on behalf of themselves and over 775 other railroads similarly situated.[1] Appellees are the

[1]We do not decide whether this is a proper case for such a class action.

members of the Railroad Retirement Board, which administers the Act, the Director of its Bureau of Unemployment and Sickness Insurance, the Chief of its Division of Claims Operations, and its seven regional directors. There are two appeals, one from an order denying a motion for a preliminary injunction, the other from a summary judgment dismissing the action. The dismissal was based on essentially the same reasoning used in denying the motion. See *Western Pacific Railroad Co. v. Habermeyer*, N.D. Cal. S.D., 1965, 248 F. Supp. 44. We affirm.

The controversy relates to the payment of unemployment benefits to certain railroad firemen, referred to in the record as "C(6) firemen." It arises in this way: In August, 1963, Congress took note of the long standing dispute between the railroads and the firemen relating to the railroads' desire to eliminate many firemen's jobs, and provided for the setting up of a special arbitration board to settle the matter. Pub. L. 88-108, 77 Stat. 132. On November 25, 1963, the arbitration board handed down its award. This provided for the elimination of certain jobs. Paragraph C(6) of the award covered firemen whose jobs were to be eliminated and who had more than two but less than ten years' seniority. They were to retain their rights to engine service assignments, "unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified." If, when such a job was offered, it was not accepted, then the fireman's "employment and seniority rights" were to be terminated and the fireman was to be entitled to a severance allowance, estimated by appellants to average in excess of $5,600. Appellants allege that over 3,000 C(6) firemen elected not to take the comparable job, but took the severance allowance. Most of them also applied for unemployment benefits under the Act.

Appellants do not in this proceeding seek review of a decision that a particular C(6) fireman is entitled to benefits. What they attack is the validity of a ruling of the Board's then Director of Unemployment and Sickness Insurance, Carter, issued on June 5, 1964, and addressed to the Board's Regional Directors. The Carter memorandum instructed them, in substance, that a C(6) fireman's choice of having his service terminated, with a severance allowance, does not disqualify him for unemployment benefits under the Act. The ruling says that such a fireman, making such a choice, is not to be regarded as having voluntarily left work without good cause within the meaning of section 354(a-2)(i) or as having failed to accept suitable work without good cause within the meaning of section 354(a-2) (ii) of the Act.[2] These views have been informally approved by the Board. Appellants seek an injunction prohibiting the payment of benefits to any C(6) fireman who terminated his employment under the arbitration award and a declaration that the Carter memorandum is in violation of the Act, that the Board's procedure in deciding the cases of C(6) firemen is in violation of sections 354(a-2) and 355(b) of the Act, that every C(6) fireman who terminated his employment left work voluntarily, that in the case of each, the Board must determine whether the leaving was with good cause, that as to each the Board must determine whether the comparable

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[2] "(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

(i) (A) subject to the provisions of subdivision (B) hereof, any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily, and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;

(B) if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply . . . ."

"(ii) any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him, or to comply with instructions from the Board requiring him to apply for suitable work or to report, in person or by mail as the Board may require, to an employment office."

job offered was suitable work and, if so, whether he failed, without good cause, to accept it, and that all payments made without such determinations are unlawful.[3]

Appellants argue that section 354(a-2) implicitly and section 355(b) explicitly command the Board to make specific findings of fact and conclusions of law on a claim by claim basis and that the blanket ruling of the Carter memorandum is in violation of these provisions. Section 355(b) reads:

> "The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits."

This contention must be considered in perspective, in the light of the nature of the duty that the Board must perform in administering the Act.

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[3]Appellants allege:

"that in each of said cases said Regional Director Defendants, and their agents or employees, acting pursuant to the terms and implicit directions of the aforesaid 'Carter memorandum' and based upon a set of facts common in every respect to and applicable in the case of each such C(6) fireman found that no such C(6) fireman 'left work voluntarily' and failed to undertake to make or make, based upon the facts and circumstances pertaining to a particular claimant, any findings whatsoever concerning:

(a) The disqualification of the claimant under said Section 4(a-2) of said Act to receive said benefits.

(b) Whether the claimant's leaving of work had been 'with good cause.'

(c) Whether, with respect to the claimant who was found to have left work voluntarily 'with good cause' or not to have left work 'voluntarily,' the comparable job offered him, pursuant to Award 282, constituted 'suitable work' for the claimant, and, if so, whether, simultaneously with leaving work, such claimant had 'failed, without good cause, to accept suitable work.' "

The receiving, processing and granting or denying of claims for benefits is a wholesale business. In 1964-65, there were 111,000 railroad workers who claimed and were paid benefits. Congress evidently knew that there would be this type of business for the Board. In section 362(f), it authorized the Board to delegate its powers. In section 362(i), procedure is established for the setting up of employment offices and the registration of unemployed workers. It provides:

> "The Board may, when such registration is made personally by an employee, accept such registration as initial proof of unemployment sufficient to certify for payment a claim for benefits."

The Board has set up seven Regional Offices and ninety District Offices. There is a large number of unemployment claims agents designated by the railroads, with whom employees may register. Registration is by filling out a form of application for unemployment benefits and employment service and a claim for unemployment benefits. The latter must be filed every two weeks. These are forwarded to the District Office, and unless there is reason to doubt the accuracy of the information given, or the claimant's eligibility, the claim is certified for payment. This is, of necessity, the "findings of fact and conclusions of law" that the Board makes in a vast majority of cases. When a large number of employees covered by the Act apply for benefits, and when their unemployment arises from some event that affects them all, it is the practice of those passing upon their claims to call upon the Board's District Office, and of such offices in turn to call upon its Regional Offices, for advice. The latter, in turn, may seek advice from the Division of Adjudication in the Board's Bureau of Unemployment and Sickness Insurance. The Bureau, if in doubt, calls upon the Board's Bureau of Law. It was just such a situation that produced the Carter memorandum, here attacked. In follow-

ing it, the Board and its agents necessarily make findings of fact and apply its conclusions of law in each case, however informal or brief or incorrect appellants may consider such findings and conclusions to be. As a practical matter, we find it difficult to see how else the Board could assure a reasonable degree of uniformity in the application of the Act to benefit claims. The Board's method of finding facts and making conclusions of law may not resemble the method typically used by a court, but we think that the method is in line with the type of administration authorized by the Act.[4]

With regard to appellants' request for a declaration that all C(6) firemen who elect to terminate their employment and accept severance pay in lieu of a comparable job must be considered to have voluntarily left work, we think that this court is without jurisdiction to render an opinion. In *Abbott Laboratories v. Gardner*, 1967, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681, decided May 22, 1967, the Supreme Court was once again called upon to consider the rules as to when a party claiming to be aggrieved is entitled to judicial review of administrative action. As Mr. Justice Harlan states the rule, it is "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . ." "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." The Administrative Procedure Act makes review available "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." (5 U.S.C. § 701(a)). In *Abbott*, the Court held that judicial review was not precluded by the statute there involved. In this case,

[4]We find it unnecessary to decide whether, as the Board contends, section 355(b) authorizes but does not require findings of fact and conclusions of law each time an applicant applies for benefits.

we are convinced that the statute does preclude the review sought by appellants.

The pertinent provisions of the Act are set out in the margin.[5]

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[5]"§355. Claims for benefits—Publication of Board's regulations.

"(a) Claims for benefits and appeals from determination with respect thereto shall be made in accordance with such regulations as the Board shall prescribe.

. . . .

"(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits.

"(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection, shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

"Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations.

. . . .

"In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this chapter but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this chapter, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such

Subsection (f) of section 355 deals specifically with judicial review. In the case of claims for benefits, it authorizes, first, the review of denials (in whole or in part) at the instance of the

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person or company is or will not have been liable for such contributions.

. . . .

"Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.

"Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section.

"(d) The Board shall prescribe regulations governing the filing of cases with and the decision of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board."

. . . .

"(f) Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of

claimant or a union representing him, and, second, review of decisions as to whether a person is an "employer," at the instance of that person. If that were all, there might be merit in appellant's contention that, because the Act does not expressly forbid review of the granting of benefits at the instance of an employer, such review must be permitted under the doctrine stated in *Abbott,* supra.

But there is more. Subsection (c) expressly limits review of the Board's decision made under that subsection to the review provided for in subsection (f). This again, standing alone, does not answer appellants. Subsection (g), however, goes further. It provides that [1] "[f]indings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, [2] the determination of any other matter pursuant to subsection (c) of this section, and [3] the determination of the Board that the unexpended funds in the account are available . . . shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. . . . Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein . . . .

"(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this chapter, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

To us, this language clearly precludes review of a decision granting benefits to a C(6) fireman or to any other employee. Appellants' answer is, first, that they are not seeking review of an individual case, that they seek to attack the Board's legal conclusion relative to C(6) firemen independent of the Board's application of the rule to a particular claimant, and that, therefore, subsection (g) can have no bearing on their case. The difficulty with this argument is that the Board's rule can have no effect until it is applied in an individual case, and when it is applied, subsection (g) precludes review. To allow this action would be to subvert Congress' obvious intention to keep review within the framework of subsection (f) and to limit review to that provided by subsection (f). Indeed, it is difficult to imagine how such subversion could be accomplished more efficiently than through such a wholesale attack as the present declaratory judgment action.

Appellants also say that subsection (g) only precludes review of decisions under subsection (c). They argue that the word "other" in the second category of subsection (g) limits the first category of the subsection to determinations of claims for benefits or refunds made within the scope of subsection (c). This interpretation would seem to charge Congress with a substantial redundancy. If the Congressional aim were only to limit review of findings of fact and conclusions of law made within the scope of subsection (c), the direct approach would have been to refer to findings of fact and conclusions of law in the determination of any matter pursuant to subsection (c). But Congress used broader language. Appellants counter that if "other" does not limit the first category of subsection (g) to subsection (c) determinations, then "other" is itself a redundancy. This, however, only follows if (1) findings and conclusions relative to claims are only authorized within the scope of subsection (c) and (2) no other determinations beyond those related to claims and refunds are authorized by subsection (c).

Neither proposition is true. Subsection (b) authorizes findings and conclusions generally with regard to claims, whether the case is reviewable under subsections (c) and (f) or not. And subsection (c) does not allow review of all determinations or by all parties aggrieved. Moreover, a full reading of subsection (c) shows that it authorizes the Board to make determinations as to whether a company should be required to pay contributions, even though no claims based upon service with such company have been filed.

We think a more logical conclusion is that the first category of subsection (g) relates to all determinations relative to claims for benefits or refunds, whether included within the scope of subsection (c) or not. The word "other" merely expands the first category to preclude review of determinations covered by subsection (c) but not related to claims for benefits or refunds. It follows that the last clause of subsection (g) expressly prohibits the review here sought.

What we have said about appellants' attack upon the Carter memorandum is, we think, equally applicable to their claim that the Board must make special findings of fact, as to each C(6) fireman. What appellants are saying, in substance, is that the Board has not made the kind of findings and conclusions that appellants think it should. They are really seeking wholesale review of the Board's findings and conclusions. Such review, whether individual or wholesale, at the instance of employers, is just what the Act in section 355(g) forbids.

In *Railway Express Agency, Inc. v. Kennedy,* 7 Cir., 1951, 189 F.2d 801, the court reached the same conclusion that we have reached as to the meaning and effect of subsection (g), and under quite comparable facts.

Affirmed.

Appendix B

Opinion of the District Court in Case No. 20785

In the United States District Court for the Northern District of California, Southern Division

No. 44304

The Western Pacific Railroad Company, and The Southern Pacific Company, suing on their own behalf and on behalf of all other railroads similarly situated,

Plaintiffs,

vs.

Howard W. Habermeyer, et al.,

Defendants.

MEMORANDUM OF DECISION

SWEIGERT, J.

Plaintiffs, Western Pacific Railroad Company, Southern Pacific Company, suing on their own behalf and on behalf of 775 other similarly situated railroads, have brought this action against defendants, as members and officials of the Railroad Retirement Board (Railroad Retirement Act of 1937, as amended 45 U.S.C. § 228a-228a-I) for a declaratory judgment and for an injunction enjoining defendants from paying any unemployment benefits out of a Railroad Unemployment Insurance Account created by the Railroad Unemployment Insurance Act (45 U.S.C. § 352) to firemen who terminated their railroad employment by accepting severance pay in lieu of other employment as provided in Part C(6) of an Arbitration Award of November 26, 1963, made under an Act of Congress in August of 1963 (Public Law 88-108, 88th Congress).

The case is presently before the Court upon plaintiffs' motion for a preliminary injunction based upon the verified complaint, an affidavit of Burnham Enersen, one of counsel for plaintiffs, and upon plaintiffs' Memorandum of Points and Authorities.

The defendants oppose the motion upon the basis of the pleadings, an affidavit of Lawrence Garland, Secretary of the Railroad Retirement Board, an affidavit of Abraham Niessen, Chief Actuary for the Railroad Retirement Board, a letter dated September 24, 1964, from Myles F. Gibbons, its General Counsel, to the General Counsel of the Association of American Railroads, and upon defendants' Memorandum of Points and Authorities.

Part C(6) of the Arbitration Award provided that certain firemen, who had more than two but less than ten years seniority and whose job was eliminated under the Award, shall retain their seniority rights unless and until offered by the carrier another comparable job for which he was or might become qualified. Under the Award a fireman who accepted a comparable job retained his seniority rights for a period not exceeding five years but, a fireman who declined to accept such comparable job, forfeited his employment relationships and seniority rights and became entitled to a "severance allowance" which, in the case of the average fireman, amounted to about $5,600.

The Railroad Unemployment Insurance Act, 45 U.S.C. §354, provides that an applicant for unemployment benefits who left work "voluntarily" is ineligible unless he left work voluntarily with "good cause" and, further, that an applicant who fails, without good cause, to accept "suitable" work available and offered to him, becomes ineligible for a period of 30 days.

The Railroad Retirement Board is charged with the administration of the program of unemployment benefits for railroad workers established by the Railroad Unemployment Insurance Act (45 U.S.C. §§351-367).

In a memorandum of June 5, 1964, addressed to Regional Directors and Chief of Claims Operations of the Railroad Retirement Board, the Director of Unemployment and Sickness Insurance of the Board advised that a fireman who was offered comparable work but who, declining to accept it, elected to take the

separation allowance instead, was not to be considered as having left work "voluntarily without good cause," within the meaning of the Railroad Unemployment Insurance Act 45 U.S.C. §354 and, further, that refusal of a fireman to accept a "comparable" job was not to be considered to be a failure, without good cause, to accept "suitable" work—within the meaning of that section.

The Court finds that defendants have been and now are paying out and will continue to pay out substantial sums of money each week from the Unemployment Insurance Account pursuant to said administrative ruling.

Plaintiffs contend that this interpretation of the Railroad Unemployment Insurance Act as applied to the provisions of Part C(6) of the Arbitration Award, is improper and unlawful and, further, that in any event the Retirement Board is obliged to but has failed to determine *with respect to each fireman applicant* whether he left work "voluntarily" with or without "good cause" and whether he failed, "without good cause" to accept "suitable work"; that the Railroad Unemployment Insurance Fund to which they are required by law to make contributions, 45 U.S.C. §358, and out of which benefits are paid, will be adversely affected by these improper payments and that the time when plaintiffs can expect to enjoy a lower percentage payment will be delayed.

Defendants contend that their interpretation and administration of The Railroad Unemployment Insurance Act is proper and lawful; that it correctly reached the general conclusion that firemen accepting the severance allowance could not be regarded as having acted without good cause either with respect to voluntarily leaving or failing to accept suitable work.

The Board justifies its general ruling of June 5, 1964, upon the ground that the provisions of Section 354, concerning voluntary leaving of "work" without good cause, is properly referable only to the particular work in which the employee had been engaged, i.e., the "job" he held at the time he separated from

railroad employment, as distinguished from leaving general railroad employment status under the elective provisions of Part C (6) of the Arbitration Award; that the leaving of a job, which became non-existent under the Award, could not under any circumstances be deemed "voluntary".

The Board further justifies its general ruling upon the ground that a fireman, who is given a choice under the Arbitration Award of either separation of his employment status or acceptance of another comparable job, and who chooses separation, could not be considered under any circumstances as having refused, without good cause, to accept "suitable" work within the meaning of Section 354.

Upon this interpretation of the law, as applied to the so-called C(6) firemen, the Board contends it would be irrelevant and idle to inquire into, and make findings upon, the specific issues in each case of "voluntariness," "suitable work" or "good cause."

Defendants further contend that plaintiffs have no right or standing in this action to subject the decision of the Retirement Board to review and that, in any event, plaintiffs are unable to establish any certain, immediate or irreparable damage.

For the purposes of the pending motion for a preliminary injunction it is not necessary for the Court to finally determine the propriety and lawfulness of the Board's interpretation and administration of the Unemployment Insurance Act so far as these C(6) firemen are concerned.

The substantiality of plaintiffs' contentions on that issue is relevant to the motion for preliminary injunction only insofar as it bears upon the question whether there is reasonable possibility that the plaintiffs will prevail in the action.

The Court finds that in this matter the Board has acted well within the limits of the discretion vested in it by law; See—*Udall* v. *Tallman,* 380 U.S. 1 (1965); *Wilbur* v. *United States,* 281 U.S. 206 (1929); *Adams* v. *Nagle,* 303 U.S. 532 (1938);

and that the possibility of plaintiffs prevailing upon their contention is doubtful, rather than reasonably probable.

Taking up now defendants' further contention that plaintiffs have no right or standing to review the Board's determination in this action, The Railroad Unemployment Insurance Act, 45 U.S.C. §355, provides that findings and conclusions of the Board in the determination of any claim for benefits or refund, and the determination of the Board that unexpended funds in the account are available for the payment of any claim for benefits or refund, shall be binding and conclusive for all purposes, including the Comptroller General, and shall not be subject to review in any manner except that certain final decisions of the Board may be reviewed upon petition to the United States Court of Appeals. This right of review is limited to claimants whose claims to benefits are disallowed, except that railroads may so contest any alleged employer-employee relationship of a particular claimant and may also contest the issue whether the railroad should be required to pay contributions required of it by the Board under the Act or to receive any refund thereof.

In *Railway Express Agency* v. *Kennedy,* 189 F.2d 801 (7th Cir. 1951), affirming 95 F. Supp. 788 (N.D. Ill. 1950), the only case in point and the only case, so far as the Court can ascertain, wherein a carrier has sought to review the Board's determination of claims for unemployment benefits, the Court held that the decision of the Board is final and conclusive, except for the review provided in Sec. 355(f); that only employees have the right of review of such determinations; that the railroad's contributions to the unemployment fund are "taxes" and that as such taxpayer, without specific interest or control over the Unemployment Fund, it has no standing to sue. See also, *Gange* v. *Rowley,* 326 U.S. 295 (1945).

The Court finds that there is no substantial possibility that plaintiffs will be able to prevail upon their contention that they

have standing in this action to subject the decision of the Board to review.

Concerning defendants' contention that defendants have failed to show that, absent a preliminary injunction, they will sustain such irreparable damage as will justify such relief, the Court notes the provisions of The Railroad Unemployment Insurance Act, 45 U.S.C. § 358; which sets forth the statutory system under which the railroads make their contributions to The Unemployment Insurance Fund.

This system is such that, although the effect of the payment of the benefit claims in question may ultimately be reflected in the contributions or contribution rates required from plaintiffs, such possibility, depending upon many factors, is a bare, problematical and remote possibility of some such detriment in the future. It is not, and the Court so finds, such certain, immediate probability of irreparable detriment as would justify issuance of a preliminary injunction affecting, not only public interest and policy, but also the claims of the so-called C(6) firemen who are neither parties to nor represented in this action. (See—*Railway Express* v. *Kennedy,* supra at 804-805 and *Gange* v. *Rowley,* supra).

Upon these findings the Court concludes that plaintiffs' motion for preliminary injunction should be and is hereby denied.

The Court reserves ruling on defendants' motion to dismiss or, in the alternative, for summary judgment pending plaintiffs' filing of its objections thereto, and such further affidavits or memoranda as plaintiffs may desire to present upon that motion. Plaintiffs are granted 15 days from service of this order for that purpose and defendants 10 days thereafter for reply.

Dated: November 23rd, 1965.

W. T. SWEIGERT
United States District Judge

Appendix C

Opinion of the District Court in Case No. 21377

In the United States District Court for the Northern District of California, Southern Division

The Western Pacific Railroad Company, and The Southern Pacific Company, suing on their own behalf and on behalf of all other railroads similarly situated, *Plaintiffs,* vs. Howard W. Habermeyer, et al., *Defendants.*	No. 44304 MEMORANDUM OF DECISION

The above-entitled case is before this Court upon plaintiffs' renewal of its motion for a preliminary injunction and upon defendants' motion to dismiss or for summary judgment.

The issues involved have been previously considered by the Court in its Memorandum of Decision filed on November 24, 1965, denying plaintiffs' original application for a preliminary injunction. See *Western Pac. R.R. Co. v. Habermeyer,* 248 F. Supp. 44 (N.D. Cal. 1965).

This Court has reconsidered plaintiffs' motion for preliminary injunction in light of plaintiffs' Memorandum of Points and Authorities, filed on March 17, 1966, and the supporting affidavits of Thomas M. Healy, a member of the Railroad Retirement Board, and Gregory S. Prince, Executive Vice President and General Counsel of the Association of American Railroads.

For the reasons set forth in its November 24, 1965 Memorandum of Decision, the Court is of the opinion that plaintiffs' instant

motion for a preliminary injunction should be and hereby is denied.

With regard to defendants' motion to dismiss or for summary judgment, this Court finds from the pleadings and affidavits on file herein that there is no genuine issue as to any material fact, that, (as found in its November 24, 1965 Memorandum of Decision) the Railroad Retirement Board acted well within the limits of the discretion vested in it by law in paying unemployment benefits out of the Railroad Unemployment Insurance Account to C(6) firemen who terminated their railroad employment by accepting severance pay under the Arbitration Award and that, (as found in its November 24, 1954 [sic] Memorandum of Decision) the plaintiffs have no standing to review in this Court the aforesaid action of the Railroad Retirement Board.

It is therefore the conclusion of this Court that defendants are entitled as a matter of law to judgment. Accordingly, defendants' motion for summary judgment under Fed. R. Civ. P. 56 should be and hereby is granted.

Defendants will prepare, serve upon plaintiffs for approval as to form and present to this Court findings of fact, conclusions of law and a formal written order thereon as provided by the rules and in accordance with the views expressed herein and in the previous Memorandum of Decision of the Court.

Dated; July 10th, 1966.

W. T. SWEIGERT
United States District Judge

Appendix D

Pertinent Provisions of the Railroad Unemployment Insurance Act.

SECTION 1(k)

(k) Subject to the provisions of section 4 of this Act, (1) a day of unemployment, with respect to any employee, means a calendar day on which he is able to work and is available for work and with respect to which (i) no remuneration is payable or accrues to him, and (ii) he has, in accordance with such regulations as the Board may prescribe, registered at an employment office; . . . .

SECTION 4

DISQUALIFYING CONDITIONS

SEC. 4. (a-1) There shall not be considered as a day of unemployment or as a day of sickness, with respect to any employee—

(i) any of the seventy-five days beginning with the first day of any registration period with respect to which the Board finds that he knowingly made or aided in making or caused to be made any false or fraudulent statement or claim for the purpose of causing benefits to be paid;

(ii) any day in any period with respect to which the Board finds that he is receiving or will have received annuity payments or pensions under the Railroad Retirement Act of 1935 or the Railroad Retirement Act of 1937, or insurance benefits under title II of the Social Security Act, or unemployment, maternity, or sickness benefits under an unemployment, maternity, or sickness compensation law other than this Act, or any other social insurance payments under any law: *Provided,* That if an employee receives or is held entitled to receive any such payments, other than unemployment, maternity, or sickness payments, with respect to any period which include days of unemployment or sickness in a registration period, after benefits under this Act for such registration period will have been paid, the amount by which such benefits under this Act will have been increased by including such days as days of unemployment or as days of

sickness shall be recoverable by the Board: *Provided further,* That, if that part of any such payment or payments, other than unemployment, maternity, or sickness payments, which is apportionable to such days of unemployment or days of sickness is less in amount than the benefits under this Act which, but for this paragraph, would be payable and not recoverable with respect to such days of unemployment or days of sickness, the preceding provisions of this paragraph shall not apply but such benefits under this Act for such days of unemployment or days of sickness shall be diminished or recoverable in the amount of such part of such other payment or payments;

(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

(i) (A) subject to the provisions of subdivision (B) hereof, any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily, and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;

(B) if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply, with respect to him, to any day in a registration period if such period does not include any day which is in a period for which he could receive benefits under an unemployment compensation law other than this Act, and he so certifies. Such certification shall, in the absence of evidence to the contrary, be accepted subject to the penalty provisions of section 9(a) of this Act;

(ii) any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him, or to comply with instructions from the Board requiring him to apply for suitable work or to report, in person or by mail as the Board may require, to an employment office;

(iii) subject to the provisions of subsection (b) of this section, any day with respect to which the Board finds that

his unemployment was due to a stoppage of work because of a strike in the establishment, premises, or enterprise at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which he was a member.

(b) The disqualification provided in section 4(a-2)(iii) of this Act shall not apply if the Board finds that—

(i) the employee is not participating in or financing or directly interested in the strike which causes the stoppage of work: *Provided,* That payment of regular union dues shall not be construed to constitute financing a strike or direct interest in a strike within the meaning of this and the following paragraphs; and

(ii) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed in the establishment, premises, or enterprise at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: *Provided,* That if separate types of work are commonly conducted in separate departments of a single enterprise, each such department shall, for the purposes of this subsection, be deemed to be a separate establishment, enterprise, or other premises.

(c) No work shall be deemed suitable for the purposes of section 4(a-2)(ii) of this Act, and benefits shall not be denied under this Act to any otherwise qualified employee for refusing to accept work if—

(i) the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(ii) the remuneration, hours, or other conditions of work offered are substantially less favorable to the employee than those prevailing for similar work in the locality, or the rate of remuneration is less than the union wage rate, if any, for similar work in the locality;

(iii) as a condition of being employed he would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(iv) acceptance of the work would require him to engage in activities in violation of law or which, by reason of their being in violation of reasonable requirements of the constitution, by-laws, or similar regulations of a bona fide labor organization of which he is a member, would subject him to expulsion from such labor organization; or

(v) acceptance of the work would subject him to loss of substantial seniority rights under any collective bargaining agreement between a railway labor organization, organized in accordance with the provisions of the Railway Labor Act, and any other employer.

(d) In determining, within the limitations of section 4(c) of this Act, whether or not any work is suitable for an employee for the purposes of section 4(a-2)(ii) of this Act, the Board shall consider, in addition to such other factors as it deems relevant, (i) the current practices recognized by management and labor with respect to such work; (ii) the degree of risk involved to such employee's health, safety, and morals; (iii) his physical fitness and prior training; (iv) his experience and prior earnings; (v) his length of unemployment and prospects for securing work in his customary occupation; and (vi) the distance of the available work from his residence and from his most recent work.

(e) For the purposes of section 4(a-2)(i) of this Act, no voluntary leaving of work shall be deemed to have been without good cause if the Board finds that such work would not have been suitable for the purposes of section 4(a-2)(ii) of this Act.

SECTION 5

CLAIMS FOR BENEFITS

SEC. 5. (a) Claims for benefits and appeals from determinations with respect thereto shall be made in accordance with such regulations as the Board shall prescribe. Each employer shall post

and maintain, in places readily accessible to employees in his service, such printed statements concerning such regulations as the Board supplies to him for such purpose, and shall keep available to his employees copies of such printed statements. Such printed statements shall be supplied by the Board to each employer without cost to him.

(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits.

(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsestion shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded the benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hear-

ing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this Act, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceedings and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain

a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this Act, of every party notified as hereinabove provided of his right to participate in the proceedings.

Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f).

(d) The Board shall prescribe regulations governing the filing of cases with and the decision of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board.

(e) In any proceeding other than a court proceedings, the rules of evidence prevailing in courts of law or equity shall not be controlling, but a full and complete record shall be kept of all proceedings and testimony, and the Board's final determination, together with its findings of fact and conclusions of law in connection therewith, shall be communicated to the parties within fifteen days after the date of such final determinations.

(f) Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall file with the court in which such petition has been filed the record upon which the findings and decision complained of are based, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjucation thereof over all other civil cases not otherwise entitled by a law to precedence. It shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of

fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section.

(h) Except as may be otherwise prescribed by regulations of the Board, benefits payable with respect to any period prior to the date of a final decision of the Board with respect to a claim therefor, shall be paid only after such final decision.

(i) No claimant or other properly interested person claiming benefits shall be charged fees of any kind by the Board, its employees or representatives, with respect to such claim. Any such claimant or other properly interested person may be represented by counsel or other duly authorized agent, in any proceeding before the Board or its representatives or a court, but no such counsel or agent for a claimant shall either charge or receive for

such services more than an amount approved by the Board or by the court before whom the proceedings of the Board are reviewed. Any person who violates any provision of this subsection shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year.

Appendix E

Paragraph C(6) of the Arbitration Award.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided,

the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

Appendix F

The Carter Memorandum

United States Government
MEMORANDUM

RAILROAD RETIREMENT BOARD
Chicago, Illinois 60611
June 5, 1964

TO Regional Directors
Regions 1, 2, 3, 4, 5, 6, 7 and
Chief of Claims Operations

FROM Director of Unemployment and Sickness Insurance

SUBJECT Separation from Service Under
Arbitration Board Award—Firemen with
More Than Two Years' Seniority

Under provisions of the award made by Arbitration Board No. 282, firemen with more than two years' seniority may, under certain circumstances, be given a choice between having all their employment rights terminated, with a severance allowance, or remaining in the service of their employer. It has been held that a fireman's choice of the first alternative—separation from service—will not affect his rights to unemployment benefits under the Railroad Unemployment Insurance Act for days after the separation.

Under Section II C(3) of the award, the section applying to firemen with more than two years' seniority whose average earnings have not exceeded $200 a month in the preceding 24 months, the employee's choice is between (1) separation from service and (2) remaining on the carrier's seniority lists with rights to such work as he is qualified to perform and which is available. A fireman who chooses to be separated under this provision is not to be regarded as having voluntarily left work within the meaning of Section 4(a-2)(i) of the Act.

Under Section II C(6), the section applying to firemen with less than 10 years' seniority not covered under other provisions,

the employee's choice is between (1) separation from service and (2) accepting another comparable job for which he is or may become qualified, which is offered by the carrier, the offer carrying with it guaranteed annual earnings for a certain period. A fireman confronted with this choice who chooses separation from service is not to be regarded as having failed to accept suitable work within the meaning of Section 4(a-2)(ii) of the Act.

The lump-sum severance allowance payable to employees who are separated from service under the above-described provisions of the award, does not itself prevent payment of benefits because it is not considered to be remuneration with respect to any day after the employment relationship is severed. (See also our memorandum dated May 15 concerning allowances payable to firemen with two years' seniority or less.)

Decisions on other questions about the effect on unemployment benefits of actions under the arbitration board award will be made as quickly as possible.

Sufficient copies are attached for distribution to district offices.

/s/ H. L. Carter
H. L. Carter

cc: Chief Executive Officer (3)

Appendix G

Judgment of Court of Appeals in No. 20785

United States Court of Appeals
for the Ninth Circuit

Western Pacific Railroad Company and The Southern Pacific Company suing on their own behalf and on behalf of all other railroads similarly situated, *Appellants,* vs. Howard K. Habermeyer, Thomas M. Healy and A. E. Lyon, individually and as members of the Railroad Retirement Board, et al., *Appellees.*	No. 20,785

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Aug. 23, 1967

Appendix H

Judgment of Court of Appeals in No. 21377

United States Court of Appeals
for the Ninth Circuit

Western Pacific Railroad Company and The Southern Pacific Company suing on their own behalf and on behalf of all other railroads similarly situated, *Appellants,* vs. Howard K. Habermeyer, Thomas M. Healy and A. E. Lyon, individually and as members of the Railroad Retirement Board, et al., *Appellees.*	No. 21,377

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Aug. 23, 1967